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February 18, 2000

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

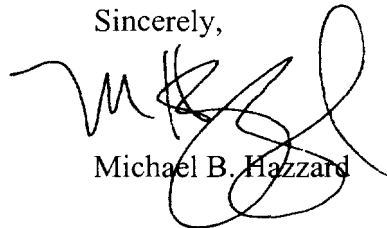
Re: Fourth Further Notice of Proposed Rulemaking Concerning Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98.

Dear Ms. Salas:

Enclosed for filing in the above-referenced proceeding are an original and twelve copies of the Reply Comments of Z-Tel Communications, Inc.

Would you kindly date-stamp the additional copy provided and return the same to the bearer. Thank you for your assistance.

Sincerely,



Michael B. Hazzard

Enclosures

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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEB 18 2000

In the Matter of

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Implementation of the Local Competition
Provisions in the Telecommunications Act
of 1996

CC Docket No. 96-98

**REPLY COMMENTS OF
Z-TEL COMMUNICATIONS, INC.**

Z-Tel Communications, Inc. ("Z-Tel"), by its attorneys, hereby submits its reply comments in response to the Commission's Further Notice of Proposed Rulemaking¹ and Supplemental Order² in the above-captioned proceeding. In these reply comments, Z-Tel makes three main points. First, the record demonstrates that, as a legal matter, use restrictions on unbundled network elements ("UNEs") are inappropriate. Second, to the extent that the Commission does permit a use restriction on UNEs, any such restriction should be based on the services provided to an end user, rather than how the end user utilizes those services. Third, the Commission should reaffirm that carriers may provide switched access service associated with their end users using UNE combinations.

I. USE RESTRICTIONS ON UNES ARE INAPPROPRIATE

In arguing in favor of placing use restrictions on UNEs, the incumbent local exchange carriers ("LECs") make three basic assertions. First, the incumbents state that they

¹ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238 (rel. Nov. 5, 1999) ("UNE Remand Order").

² *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, Supplemental Order, FCC 99-370 (rel. Nov. 24, 1999).

should not be required to provide unbundled loop and transport combinations (*i.e.*, “EELs”) because any UNE combination that could be used as a special access substitute does not satisfy the “necessary and impair” standard set forth in section 252(d)(2) of the Communications Act of 1934, as amended (“Act”).³ Second, the incumbent LECs claim that the Act’s unbundling provision, section 251(c)(3), permits the Commission to impose “just, reasonable, and nondiscriminatory” conditions on UNEs.⁴ Third, the incumbent LECs maintain that section 251(g) vests authority in the Commission to impose use restrictions to protect the access charge regime.⁵ As described below, these positions are incorrect – neither the Act nor the Commission’s findings interpreting the Act permit use restrictions on UNEs.

In response to incumbent claims that the Act’s “necessary and impair” standard precludes the provision of EEL combinations, Z-Tel notes that the Commission already has decided that competitors may use UNEs and UNE combinations to provide exchange access. In the UNE Remand Order, the Commission found that local loops and transport circuits satisfy the “necessary and impair” standard, such that incumbents must offer these items as UNEs. The whole point of the “necessary and impair” standard is to determine which elements must be made available “for the purposes of section 251(c)(3).”⁶ Once the Commission determines that a UNE must be made available, the competitive LEC – not the incumbent – determines which telecommunications services are provided over those network elements. In cases where a special

³ Bell Atlantic at 13-14; BellSouth at 24-29; GTE at 8; SBC at 6-17; U S WEST at 4-12.

⁴ U S WEST at 14.

⁵ BellSouth at 15; GTE at 17; SBC at 22-24; U S WEST at 14.

⁶ 47 U.S.C. § 251(d)(2).

access circuit exists, the Commission's rules require incumbents to provide these circuits as UNE combinations. Accordingly, as MCI WorldCom notes, "there is no dispute that these elements must be made available to requesting carriers on an unbundled basis."⁷ Incumbent claims to the contrary amount to an effort to have the Commission reverse determinations made in the UNE Remand Order just three months ago.

Incumbent LEC claims that the "just and reasonable" language in section 251(c)(3) empowers the Commission to place use restrictions on UNEs is similarly faulty. As a threshold matter, the plain language of section 251(c)(3) applies to all telecommunications services.⁸ Moreover, the Commission's implementing rules support the position that section 251(c)(3) applies equally to all telecommunications services.⁹ This understanding of section 251(c)(3) is made clear in the Commission's implementing rules:

- 47 C.F.R. § 51.307(c) provides that incumbents must provide an unbundled network element in a manner that allows the requesting carrier to provide any telecommunications service that can be offered by the means of that network element;
- 47 C.F.R. § 51.309(a) provides that incumbents shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting carrier intends; and
- 47 C.F.R. § 51.309(b) provides that a telecommunications carrier purchasing an unbundled network element may use such network

⁷ MCI WorldCom at 1.

⁸ AT&T at 4; CompTel at 8-14; Sprint at 3-5; MCI WorldCom at 5-7.

⁹ AT&T at 5-6; Sprint at 4.

element to provide exchange access services to itself in order to provide interexchange service to subscribers.¹⁰

Thus, the plain language of the Act precludes use restrictions on UNEs, and the Commission's implementing rules and orders consistently have supported this view.

Incumbent LEC assertions that section 251(g) empowers the Commission to place use restrictions on UNEs also are incorrect. As noted by several commenters, the Commission already has ruled against the incumbents' position on this issue.¹¹ For example, the Commission previously has found that "the primary purpose of section 251(g) is to preserve the right of interexchange carriers to order and receive exchange access services if such carriers elect not to obtain exchange access through their own facilities or by means of unbundled network elements purchased from an incumbent."¹² Moreover, the Commission has found that section 251(g) "does not apply to the exchange access 'services' requesting carriers may provide themselves or others after purchasing unbundled network elements."¹³ Thus, section 251(g) may not be used to restrict access to UNEs.

¹⁰ AT&T at 6; *see also*, CompTel at 10.

¹¹ AT&T at 6; CompTel at MCI at 6; Sprint at 7-8

¹² *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, First Report and Order, 11 FCC Rcd 15499, ¶ 362 (1996) ("First Report and Order") (subsequent history omitted).

¹³ *Id.*

**II. ANY UNE RESTRICTION IMPOSED BY THE COMMISSION SHOULD
LOOK TO WHAT THE CARRIER PROVIDES, RATHER THAN THE
END USER'S USAGE PATTERN**

The incumbent LECs argue that they should not be required to provide unbundled loops, transport, or combinations thereof (*i.e.*, “EELs”) when those facilities would be used “predominantly” as substitutes for special access services or intraLATA private line services.¹⁴ Aside from the noted legal issues associated with imposing use restrictions on UNEs, Z-Tel submits that the “predominant use” test proposed by the incumbent LECs is administratively unworkable. Indeed, any “test” based on a customer’s usage pattern strikes Z-Tel as odd because customers, not carriers, dictate the telecommunications services received from carriers and the ways in which those services are utilized.

For example, Z-Tel provides a bundle of local exchange, exchange access, and interexchange services to its end users. Although Z-Tel provides all of these services to its end users, Z-Tel does not control how an end user utilizes these services. For example, some of Z-Tel’s end users may make no local exchange calls over a given period of time, and instead may make only interexchange calls. Other Z-Tel end users may make no interexchange calls over a given period of time, and instead may make only local exchange calls. The point is, Z-Tel can control only the services that are provided to an end user – not how the end user utilizes such services. Thus, any use restriction placed on UNEs should look to what services the carrier provides to the end user, rather than how the end user utilizes those services.

¹⁴ See, *e.g.*, SBC at 2.

III. THE COMMISSION SHOULD REAFFIRM THAT INCUMBENTS MAY NOT LIMIT THE ABILITY OF COMPETITORS TO PROVIDE SWITCHED ACCESS SERVICES TO THEIR END USERS USING UNE COMBINATIONS

In its comments, U S WEST asserts that the Commission should restrict the ability of competitive LECs to utilize combinations of UNEs, including switching, to originate and terminate interstate toll traffic to customers to whom the requesting carrier does not provide local exchange service.¹⁵ In defense of this position, U S WEST appears to suggest that a consumer could be precluded from receiving local telephone service if the Commission permitted unrestricted conversions of switched access service to UNEs.¹⁶ This concern is wholly unfounded. As noted above, consumers – not carriers – dictate the telecommunications services provided over the UNEs dedicated to their use. If a consumer's carrier is not offering the services desired – or if taking a carrier's service would prevent a consumer from obtaining other needed telecommunications services – the consumer will simply migrate to a carrier that does provide the service mix demanded. Thus, as a matter of basic supply and demand, the scenario suggested by U S WEST simply does not and will not occur in practice.

By contrast, incumbent LEC-imposed restrictions on the use of UNEs to provide switched access services are occurring in practice. In numerous jurisdictions, incumbent LECs are attempting to limit the ability of Z-Tel and other competitors to provide switched access services associated with their local exchange end users. In Texas, for example, Southwestern Bell Telephone ("SWBT") has informed Z-Tel that it must route intraLATA toll traffic through an interexchange carrier rather than directly to the called party using UNEs. This situation raises

¹⁵ U S WEST at 22.

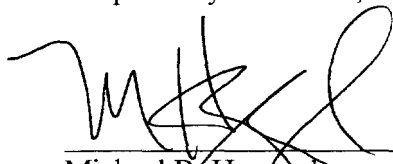
¹⁶ *Id.* at 22-23.

Z-Tel's costs by requiring it to pay SWBT switched access rates, rather than UNE rates, for delivering an intraLATA toll call to an end user. Z-Tel presently is working with SWBT to resolve this issue, but at present, Z-Tel faces a very real, incumbent LEC-imposed use restriction on its ability to use UNEs to deliver intraLATA toll calls. To help prevent such unilateral use restrictions from continuing in Texas and in other jurisdictions, the Commission should reaffirm that incumbents may not limit the ability of competitors to provide switched access services to end users using UNEs and UNE combinations.

IV. CONCLUSION

For the foregoing reasons, Z-Tel submits that the Act, as confirmed by the Commission's implementing rules, does not permit restrictions on UNEs utilized by telecommunications carriers to provide telecommunications services.

Respectfully submitted,



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